Drafting A Constitution in Burma: Lessons From the Past

By Josef Silverstein

As the peoples and leaders of Burma approach the task of writing a third constitution, a good place to begin is by asking the question, why did the previous constitutions fail to unite the indigenous ethnic minorities and the government in peaceful viable polity. At the heart of the problem is the questions which vexed the founding fathers-how to construct a union in which people who formerly were separated could be joined together so as to benefit from unity while remaining nominally autonomous in their own areas on matters of political rule, economy and culture.

Probably the clearest and most direct statement on the question was made by the AFPFL- the nationalist party which led the nation to independence- just before Aung San went to England to discuss Burma's future with the British Prime Minister.

Our policy in regard to the Frontier Areas of Burma will be to seek cordial relations with the peoples of these areas with a view to the formation of a union or a federation of Burma formed by the willing consent of all the races inhabiting the whole of Burma. Although we shall be willing at all times to assist by financial and other means in the welfare and development of the Frontier Areas, it is not our intention to impose on the races inhabiting these areas any form of union which they themselves do not desire and should such union or federation be formed, it will be our policy to leave to the States such autonomy as they may need for the control and management of their own internal affairs. At the time when the constituent assembly is to be elected for Burma it will be our policy to invite the people of the Frontier Areas to join in the work of such assembly under conditions as may be mutually agreed upon in order that should the races of the frontier areas so desire, these areas would be able to march with Burma proper to full autonomy.

Speaking on the eve of the Second Panglong Conference, Aung San said that, "the affairs of the Frontier Areas are the concern of the peoples of those
areas. If they declare they want the same right and privileges as ourselves, they will get them.”

And, at the Conference, he said further that,
"the Hill Peoples would be allowed to administer their own areas in any way they pleased and the Burmese would not interfere in their internal administration".

Finally, he promised the participants equality with the Burmese by saying, "If Burma receives one kyat, you will also get one Kyat" In sum, the AFPFL and its leader, Aung San, answered the question posed by promising equality and autonomy in a federal union based on the principle of unity in diversity.

For such a union, Aung San argued the architects must be pragmatic; adopt principles and tailor institution to their needs, not slavishly copy any existing model of federalism in existence at the time." Anything we have tried to utilize from modern constitutions of the world, we have selected…and thoroughly adopted to suit Burma's aspirations and Burmese genius. " Sadly, the end-product, which Aung San did not live to see, did not turn out as he had hoped. Instead of unity, it created disunity; for as U Chan Htoon, the Union Attorney General in 1952, succinctly described it in an argument before the Supreme Court, the Union of Burma was federal in theory and unitary in practice.

It might be helpful to review some of the less well-known events leading up to the writing of the first constitution. First, it should be remembered that Aung San and the AFPFL were at the forefront of bringing the Frontier Areas into the anticipated union of Burma. On January 1, 1947, on the eve of Aung San's departure for London and his meeting with the British Prime Minister, Clement Attlee, the AFPFL released a new Frontier Areas policy statement which called for simultaneous freedom for Burma proper and the Frontier Areas; it also called for the immediate appointment of a representative from the Frontier Areas on the Executive Council to advise on local problems and the inclusion of the Karenni States at the Constituent Assembly, where they could decide whether or not join the Burma federation.

Unfortunately, Aung San never raised the question of adding representatives of the Frontier Areas to the Burma delegation, since the invitation was extended only to Aung San and the Executive Council. The Shans, as the largest ethnic group and most politically advanced in the Frontier Areas with experience in dealing directly with the British since the formation of the Federal Council to Shan Chiefs in 1922, made their desires to participate in the discussions known, but neither the Burma delegation nor the British sought to react positively their request.

The agreement reached between the Burman and British leaders, at the conclusion the London meeting, were seen as decisions taken over the heads of the Shans and were resented by many of their leaders. But the Burman leaders saw them differently; they were seen as important concessions by the British to allow greater contact between Ministerial Burma and the Frontier Areas and acceptance of the AFPFL demands made on the eve of the meeting. The Aung San-Attlee Agreement concluded that
1. both parties wanted to see early unification between the two areas with the free
consent of the concerned inhabitants and
2. the peoples of the Frontier Areas should, in respect of subjects of common
interest, be closely associated with the Government of Burma in a manner
acceptable to both parties.

To realize the latter objective, it called for

1. free intercourse without interference between the peoples of the two areas;
2. a meeting between the leaders of the two groups, where the peoples of the
Frontier Areas should be asked to express their views upon the form of
association with the Government of Burma which they considered acceptable
during the transition period;
3. the Frontier Areas either should appoint a small group to adviser the Governor
on Frontier Areas Affairs and to have close liaison with the Executive Council
or, appoint one Frontier Area representative as Executive Counsellor in
charge of Frontier Affairs, or some other method.

The Agreement also said that following the meeting, either at Panglong or elsewhere,
the British and Burma governments will decide the best way to associate the two areas
in accordance with the expressed views of the peoples of the Frontier Areas. Finally, a
committee of Inquiry should be formed to take testimony from peoples of the Frontier
Areas in order to gather their views on the future association.

The Panglong conference (Feb. 7-12, 1947) and Agreement are the watershed of
Burma-Frontier Area relations. The Shans and Kachins met on the eve before the
Conference and drew up a five-point resolution which called for equal rights and
privileges with the Burmans; political autonomy in their states if the Frontier Areas join
the Executive Council; not to be bound by the Aung San-Attlee Agreement and the
right of secession from the proposed federation after Burma received its independence.
On the next day, the Chins delegation arrived, met with the first two, gave its approval
to the five point resolution and then added two more, which the others accepted. The
Chins proposed that the Kachin and Chin States have the same privileges to draw on
the central revenues as the Shan State already enjoyed and that the Burma government agreed to supplement any
local financial deficit. Its second proposal was that the
frontier peoples form a supreme executive council of the
united hill peoples to decide on future policies between
Ministerial Burma and their areas. As the conference drew
to a close an agreement was entered into between the two
group. Among other things, it called for a representative
of the hill peoples to be appointed as a Counsellor to the
Governor to deal with the Frontier Areas; the Counsellor
to be appointed to the Executive Council, without
portfolio, and the Frontier Areas to be within the
authority of the Executive Council. It also called for the
appointment of two Deputy Counsellors to represent
races of which the Counsellor was not a member. The
addition of a Frontier Areas Counsellor was barred from interference with internal
autonomy of the separate administrations in the Frontier Areas; the leaders restated
that full autonomy in internal administration for the Frontier Areas was accepted in principle. The agreement left to the Constituent Assembly the responsibility to demarcate and establish a Kachin State within a unified Burma. It also mandated that the principle that "citizens of the Frontier Areas shall enjoy rights and privileges which are regarded as fundamental in democratic countries."

Following the close of the Conference, the Governor appointed Sao Samhtun, Sawbwa of Mongpawn (Shan State) as the Frontier Area Counsellor, Sima Suwa Sinwa Nawng (Kachin State) and Vum Ko Hau (Chin Hill) as the two Deputy Counsellors.

Despite the breadth and importance of the Panglong Conference and Agreement, they did not settle all major problems with the peoples of the Frontier Areas. The Karen neither participated nor approved its outcome. Also many of the smaller minority groups were not present and did not give their approval. Part of the omission was made up when the Frontier Areas Inquiry took place and all minority groups were given a chance to testify. Following the hearings, the Inquiry Committee recommended that:

1. The Frontier Areas be given representation at the Constituent Assembly; it did not recommend normal election procedures for electing delegates because there was no time to compile election lists, campaign and vote. Thus, there was uneven representation at the Constituent Assembly with some minority delegates named because of their class status, while others were chosen by various means.
2. The Inquiry Commission recommended that the Areas be given 45 delegates who would have equal status with the delegates from Burma proper in deliberations and committee assignments.
3. It further recommended that participation in the Constituent Assembly did not automatically commit the frontier peoples to accept federation proper. Finally,
4. It recommended that no decision regarding state government taken by the Constituent Assembly should be considered passed unless a majority of the frontier delegates join in support of the proposal.

The witnesses before the Inquiry Committee revealed the deep misgivings and fears of many of them. The Chin witnesses could not convince the Committee whether or not they wanted statehood in the proposed federation or amalgamation of their areas with Burma proper. Much of the confusion turned on the terminology which was not ever precise and, at times, was misleading. The word union, for instance, was used to mean amalgamation most of the time, and federation to mean the creation of a federal state. However, the two were used interchangeably and this led to misunderstanding.

The Panglong Agreement must be read in conjunction with the Frontier Areas Committee of Inquiry in order to sample the varied positions taken by the leaders at one level and the witnesses at another. Clearly, it left much unsaid about the future story.
It is against this background that the state arrangement in the 1947 constitution must be seen.

The 1947 constitution did not create a federal structure as that term is generally understood. It created a union of unequal states. They differed in several important ways. They had unequal representation in the upper chamber of the parliament Chamber of Nationalities-- which in federal constitutions the world over recognized equality between states in the union. Also state members to the upper house were selected differently; in one case they were named; in another the seats were reserved for members of a social class and still in other they were elected at large from the general population of the states.

Nominally, the right of secession was given to all states in the Union (Art.201). But it did not apply to Burma proper because that State was governed by the national government and the two were inseparable. The constitution permitted the Shan and Karen States the right of secession under conditions outlined in the constitution, but the Karen, Kachin and the Chin Special Division were individually denied the right.

The legislative bodies in the several States and the Special Division were the State Councils. Membership in the State Council was derived from election or appointment to one of the two chambers of the parliament at the national level. So long as an individual held his seat in the national parliament, he automatically was a member of his State council. And so long as he remained a member of the national parliament he could not be removed from his seat in the State council, no matter what the people there wanted. In the Shan and Karenni State, the members were drawn from a particular social class, while in the Kachin State, they were divided between representatives drawn from two different ethnic groups. In the Karen and Chin Special Division they were elected generally for the state population.

The Head of each of the states gained his office by being selected by the Union Prime Minister to fill the office in his cabinet of Minister from his state. As such he automatically was named the head of his state, again whether or not the people in his state wanted him. In short, he served at the pleasure of the Prime Minister and could be removed only by that official.

Initially, there was no separate judiciary in the several states. The federal judiciary served in the states as well as in the union. Although a State Courts Law was passed, it never was fully implemented.

While states had some taxing power, all were dependent upon the Union Government to provide a large portion of the funds to pay for the administering of the state and providing some of its services. The states had the right to use local languages at the local level and the schools in the states used local languages for instruction through the fourth standard, all education above that was conducted in Burmese and English. But this put local students at a disadvantage as they moved to higher levels of education.
where they had to compete with Burman students who learned the language both at home and in the first grades of school.

These are just some of the ways the states were under the influence and control of the Union Government. And in these ways, the political system was more unitary than federal.

The system began to experience strains and general criticism almost from the birth of the independent Union. Civil war, invasion and insurgency raged though much of the nation but lasted longer in the Frontier Areas and gave the national army a direct role in governing at the expense of local officials. Also, as differences developed between the leaders of the governing party in Rangoon and the emerging opposition in the several states, federal interference in local affairs became major issues, especially in the Karen and Kachin States as the Prime Minister named Heads of States from his supporters rather than selecting a representative of the majority in the state. These and other problems created tension between the states and the national government; when, in 1958, a crisis arose in the national governing party, it had direct effect upon the states. During the next few years, insurgency expanded in the state as the local citizens sought to express their dissatisfaction and to try and bring change. As fears rose in Rangoon that the Shan State might try to invoke its right to secede, the military used this growing concern as an excuse to overthrow the government and replace it with a new and different one with itself holding all power.

The failure of the constitution in the initial period to bring unity and harmony to Burma can be traced to many things; it resulted, in part, from the lack of trust on the party of the national leaders in their counterparts in the states; the national leaders feared that if the central government did not exercise close control, the states might fall behind Burma proper and national unity might collapse. It also resulted from the adoption of principles which were tried and tested in existing federal states and they fell short when put to the test when applied to Burma. While it can be argued that the effort to find and adapt new and unique ideas to the particular situation in Burma which were not slavish copies of those in existence elsewhere in the world, as Aung San suggested in the period before independence, meant that the system that was constructed did not serve the people well. It divided rather than unified the nation.

A fter twelve years of military dictatorship (1962-1974) where all power was concentrated in Rangoon and an administrative dictatorship replaced the democratic centralized system of the founding fathers, the military oversaw the writing of a new constitution and the transfer of power to a single political party it created and through which its members continued to rule.

The army constructed an elaborate process which it lead to include the people in the drafting of the constitution; but it did not allow any independent voices to be raised. It carefully orchestrated the process through three drafts and a national referendum, which allowed the people no choice in acceptance or rejection.
Under the Burma Socialist Program Party constitution, there was no federalism. The state was unitary with nominal subdivisions to create the illusion of some kind of division of areas. In place of the State Councils and the previous system of local governments, the military institutionalized a hierarchy of Councils which were linked to the government in Rangoon. Under the principle of local autonomy under central leadership, the soldier-authors described their handiwork as the State of Burma "being organized hierarchically into people's councils at the three levels below the national government ...each having equal power and status with another at the same level along Socialist Democratic principles and each serving as a local organ of power with wide self-management power." But with all power located in the Pyithu hluttaw and controlled through a single party operating throughout the nation on the basis of centralism, the State was unitary and not federal as its name, Socialist Republic of the union of Burma, implied.

Under the new constitution, the people had no absolute rights; all rights were conditioned by the goals of the state. While the basic document said that every one had the right of freedom of thought and religion, the state could enact laws restricting them in the interest of the working people and law and order. The second constitution created a constitutional dictatorship where the promises made to the people at large and the minorities in particular by Aung San and the founding fathers were totally set aside and forgotten as the military and its puppet, the Burma Socialist Program Party, worked to mold the State in the image of the East European Republics together with some aspects of the political system of the People's Republic of China. The constitution failed for it too did not grant real autonomy and political control in the states. The continuing civil war and rebellions together with forced labor, and the growing exodus of more than 100,000 peoples to escape the brutality of the military, together with the eruption of demonstrations and resistance in the heartland offer proof that the second constitution and the new absolute dictatorship of the military is far worse than its predecessor at creating national unity.

What lessons can be learned from the past? I think several.

1. There were commitments made by Aung San and the founding fathers of modern Burma that all the people would be treated equally; that the minorities would enjoy autonomy and self-rule in their own areas and that together the Burmans and the minorities would build a peaceful and harmonious state on the basis of national unity. Those promises are still remembered by the peoples in the Frontier Areas and they continue to hope that a government will rise in Rangoon which will honor them. Until that is done, the future of Burma is no brighter than its past.

2. The Burmans, too were promised a democratic form of government with protection of their human and civil rights. Whatever they had until March 2, 1961, they lost and they, too, look forward to their restoration.
3. The people of Burma gave their overwhelming support to the NLD in the 1990 election and expected that it would form a government and lead a new parliament in peacefully transforming Burma from a military dictatorship to a democracy; and they expected that the new government would oversee the writing of a new constitution which would be based on principles expressed by Aung San and the men and women who shared his vision of a free, harmonious and peaceful Burma. The effort of SPDC/ SLORC to usurp their right and, once again, write a constitution which will keep the military in power and deny the people the right to rule is not more acceptable now than it was in 1974. And if the military goes ahead with their plans to write the new constitution, they will not heal the nation and end civil war.

4. The future state of Burma must be based on an agreement of how to share power. What exactly is the power of the national government and of the several state governments? This applies of all aspects of life- political, military, economic, social and cultural. These are questions which need serious thought, discussion and debate so that the nation can arrive at a consensus which all or at least a majority will accept.

5. In addition to establishing a viable state, the authors of new constitution must be prepared to discuss and resolve the right of the several states to tax and spend so that their government will be able to carry out programs the people desire. Unless they are granted the right to do these things, they will not be able to create viable and financially sound states. They will be forced as under the 1947 constitution to look to Rangoon both for permission to spend, approval of their expenditures and interference from the national government on things that properly belong to the states. The states must be linked with each other; must be able to talk with each other.

6. There must be an end to internal war in Burma. War was outlawed as an instrument of national policy in the 1947 constitution (Art. 211). But that applied only to international affairs. In the future the constitution must proscribe the right of the military to interfere with government and usurp its powers. The constitution must be explicit: there must be civilian supremacy between police and military power with the former responsible for maintaining internal order and the latter to protect the borders from invasion. There must be freedom of speech, assembly and the right to choose the nation’s leaders through secret ballot. There also must be the rule of law, where an independent judiciary will decide cases free of all interference by political or military personnel.

For half a century, Burman has been at war with itself. It will never find peace until the people elect a government they respect and trust. It is for this reason that writing a new constitution, which the people will uphold and defend, is the most important task facing the nation: Only when such a law is in place and the people and their leaders respect and uphold it, will the nation be able to turn to the questions of economic and social development and take their place in the family of nations.